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No. 96-910

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITY OF CHICAGO, *et al.*,
Petitioners,

v.

INTERNATIONAL COLLEGE OF SURGEONS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR THE PETITIONERS

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11 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Respondents make no effort to defend the primary ground for the Seventh Circuit's decision in this case—which was that the phrase "civil action" found in both the federal-question and removal statutes (see 28 U.S.C. §§ 1331 & 1441) does not reach an action in which the findings of a state or local administrative agency are reviewed deferentially. Instead, respondents rely primarily on the phrase "original jurisdiction" found in those statutes, and contend that it precludes any form of deferential or "quasi-appellate" review (*e.g.*, Br. 4, 9-10). Of course, respondents do not press this point too strongly, since they concede that federal district courts exercise "original jurisdiction" over federal Administrative Procedure Act actions even though these actions involve deferential review of the findings of an administrative agency (*e.g.*, Br. 6-7). And if courts of "original jurisdiction" can

perform this type of review when the decision of a federal agency is at stake, then surely there is no jurisdictional bar to this type of review when the decision of a state or local agency is challenged under an analogous state administrative review law.

1. Respondents claim that federal courts cannot review the findings of state and local agencies because such review would be a forbidden "intru[sion] into the state's system of administrative review" (Br. 7). On this point, they claim support from this Court's decisions in *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574 (1954), and *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348 (1961). Even the Seventh Circuit, however, did not embrace respondents' reading of *Stude* and *Horton*. As we pointed out in our petition, the court of appeals acknowledged that the holdings in both *Stude* and *Horton* do not reach the question presented by this case. See Pet. 11-12; see also Pet. App. 11a. Moreover, even respondents do not believe that *Stude* or *Horton* erects any absolute bar to federal judicial review of state administrative decisions; as we explain in our petition, and as respondents acknowledge, *Horton* makes clear that a federal court may hear an attack on a state or local agency's decision if applicable state law provides for de novo review. See Pet. 11-12; Br. 4. It is more than passing strange that respondents can brand deferential review of a state or local agency's decision an "intrusion" into the state's system for reviewing agency decisions, yet concede, as they must, that a trial de novo on the propriety of an agency's decision is not.

Respondents are also incorrect when they argue that the majority of courts squarely line up behind the principle that federal "district courts are without jurisdiction to review on appeal the findings of state agencies . . . ." Br. 3, 4. Respondents characterize the decision in *Range Oil Supply Co. v. Chicago, R.I. & P.R. Co.*, 248 F.2d 477 (8th Cir. 1957), as a rogue opinion inconsistent with decisions in no fewer than seven other circuits. See

Br. 3-6. In truth, prior to the decision below only three circuits had decided the question presented here, and they had split 2-1. While the decision in *Range Oil Supply* was rejected in *Fairfax County Redevelopment & Housing Authority v. W.M. Schlosser Co.*, 64 F.3d 155 (4th Cir. 1995), and *Armistead v. C & M Transport, Inc.*, 49 F.3d 43 (1st Cir. 1995), we explained in our petition why the other cases cited by respondents are in fact distinguishable (see Pet. 10-11 n.3), as did Judge Widener in his dissent in *Fairfax County* (see 64 F.3d at 162 n.4).

Even more important, *Range Oil Supply* represented settled law on this point for nearly 40 years. Until 1995, it was the only appellate decision on point, and as we explain in our petition, it was treated as established law by the leading commentators. See Pet. 10. Thus the decision below, as well as the two 1995 decisions on which it relied, have upset settled law in this area, and have rendered all of the litigation undertaken in reliance on *Range Oil Supply* jurisdictionally defective, and thus subject to collateral attack.

On this issue, respondents attempt to draw support from one of the leading commentators, whose treatise we cite in our petition: "A statutory proceeding in a state court to review an administrative determination is a civil action, unless the review proceeding is such an integral part of the administrative process as to constitute a continuation of the administrative proceeding." Br. 7-8 (quoting 1A James W. Moore, MOORE'S FEDERAL PRACTICE ¶ 0.157 [4.-3] at 73-74 & nn. 6-7 (2d ed. 1996)). But the exception to the scope of removal jurisdiction for an action that is part of the administrative process is not relevant here. The exception is applicable only to cases where the review proceeding concerned a ruling still pending before the administrative agency for decision, see *California Packing Corp. v. I.L.W.U. Local 142*, 253 F. Supp. 597, 598-99 (D. Hawai'i 1966), where the decision to be rendered in the review proceeding was a non-binding one, see *Decker v.*

Spicer Manufacturing Division of Dana Corp., 101 F. Supp. 207, 209-10 (N.D. Ohio 1951), or where the proceeding was not judicial in nature, see *Ex parte State of Oklahoma*, 37 F.2d 862, 864 (10th Cir. 1930). That simply does not describe this case. Here, the review required by applicable state law is "judicial review of 'final decisions' of [the] administrative agenc[y] . . . ." Pet. App. 16a. See also 735 ILCS para. 5/3-102 (1994). As the court observed in *Vann v. Jackson*, 165 F. Supp. 377 (E.D.N.C. 1958), "[r]ather than provide for a continuation of any administrative function," the review proceeding in federal court is "the point at which the administrative process ends, for the review provided is confined to a determination of *legal* issues by a *judicial* body." *Id.* at 380 (emphasis in original). On that basis, the court concluded that the review proceeding must be a "civil action." See *ibid.* Indeed, in *Stude*, the Court wrote that once a party aggrieved by an agency's decision takes "a perfected appeal and the jurisdiction of the state district court is invoked, it then becomes in its nature a civil action subject to removal by the defendant to the United States District Court." 346 U.S. at 578-79. That same conclusion should be reached here.

2. Respondents' treatment of *Califano v. Sanders*, 430 U.S. 99 (1977), and related authority under the APA, on which we rely for our position that federal-question jurisdiction exists here for ICS's state-law claims, is particularly unsatisfying. Respondents observe that the APA instructs district courts to grant deference to the findings of federal administrative agencies. See Br. 7 & n.3. This overlooks the precise holding of *Califano v. Sanders*—that jurisdiction in the district court over APA actions is conferred by the federal-question statute (28 U.S.C. § 1331) and not the APA. See 430 U.S. at 104-08. Thus the grant of "original jurisdiction" over "civil actions" in Section 1331 plainly includes cases in which a district court must grant deferential and on-the-record review to an administrative decision.

Respondents' position, therefore, reduces to the claim that the phrases "original jurisdiction" and "civil action" mean one thing in the context of review of a decision of a federal administrative agency, and another in the context of review of a decision of a state administrative agency. There is surely no support in the text of either the federal-question or removal statute for this odd construction, nor do we see any reason why, if Congress has instructed federal courts to grant "quasi-appellate" review of the decisions of federal agencies, the district courts may not hear as "civil actions" within "original jurisdiction" the same kind of cases brought under state laws that similarly provide for deferential review. Indeed both the state and federal trial courts hear administrative cases—federal district courts under the APA and, in Illinois, state courts under its Administrative Review Law. See 735 ILCS para. 5/3-104 (1994). No one has ever thought the district court's APA deferential review to be an appellate proceeding, and it is no more appellate on review of a state administrative decision.

If there is any difference between the scope of jurisdiction to review the findings of federal and state agencies, then, it must rest not on any language actually in the pertinent jurisdictional statutes, which draw no distinction between federal and state administrative agencies, but on some principle of federalism articulated in neither the decision below nor in respondents' brief. Yet as we explain in our petition, and note again above, no theory of federalism could possibly support the conclusion reached by the Seventh Circuit here—that federal courts can review state and local agency action only de novo. See Pet. 13-14.

3. We also explain in our petition why, even if state-law claims seeking deferential review of a state or local agency's decision do not constitute "civil actions" within "original jurisdiction," they are at a minimum "claims" that may be heard if joined, as they were here, to federal constitutional attacks on the decision of a state or local

agency that are unquestionably within original jurisdiction. That is the plain import of the supplemental jurisdiction statute, 28 U.S.C. § 1367. On this point, respondents merely return to their argument that a district court cannot "function as both a court of original federal jurisdiction as well as a state quasi-appellate panel." Br. 10. The only statutory language that respondents have ever offered for their conclusion that district courts are without jurisdiction to grant deferential review are the phrases "original jurisdiction" and "civil action," which they read to forbid anything except de novo review of the decision of a state or local agency. Such a view is decidedly irrelevant to the supplemental jurisdiction statute, which permits a district court to exercise jurisdiction over any "claim" as long as it is joined with another claim that is within original jurisdiction and says nothing about "civil actions." And although ICS now characterizes its federal constitutional claims as "tangential" (Br. 9), it certainly believed in these claims strongly enough to file them. The City was entitled to have those federal claims heard in federal court and, under Section 1367, to bring the state-law claims along as well.

4. Respondents also contend that this case is not an appropriate vehicle to review the correctness of the holding below that an action is not removable if it contains even one claim that a federal district court may not hear. As we explain in our petition, the only authority on which the Seventh Circuit relied on this point, *Frances J. v. Wright*, 19 F.3d 337 (7th Cir.), cert. denied, 115 S. Ct. 204 (1994), involved a claim that fell within the scope of Eleventh Amendment immunity. Respondents acknowledge that there is a split in the circuits on this point, but they attempt to distinguish these cases from the present one by the simplistic observation that this case does not involve the Eleventh Amendment. See Br. 10. This misses the point. The holding of both *Frances J.* and this case is that if any claim falls into a class of claims that a federal court is prohibited from hearing, the case is

not removable. And that holding is in square conflict with several decisions holding that the presence of one jurisdictionally barred claim does not prevent removal of the rest of the case. See Pet. 18. In short, the presence of a claim that receives deferential review operates, in the Seventh Circuit's view, identically to the Eleventh Amendment and deprives the district court of jurisdiction over the case. And if that is so, then the issue presented in *Frances J.* is raised in this case as well.

5. Finally, respondents fail to comment on what may be the most compelling aspect of the petition—that if the Court does not decide the jurisdictional question posed by this case now, it may never have the opportunity to do so. Because a district court's order remanding a case may not be reviewed on appeal, the remand order that the district court has been instructed to issue will never be reviewable, nor will future remand orders issued in reliance on the decision below. See Pet. 19-20. The Court is already effectively unable to review the soundness of the law on this point in the First and Fourth Circuits. If the Court denies review here, the Seventh Circuit's view will be insulated from review, as will the decisions of district courts in other circuits to remand cases in reliance on the law in these circuits. That, along with the fact that the decision below creates jurisdictional uncertainty and confusion, counsels for plenary review of this case at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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